

1 IN THE UNITED STATES DISTRICT COURT
2 FOR NEBRASKA
3 TONIA ACKERMAN and DENNIS)
4 ACKERMAN,)
5 Plaintiffs,) CASE NO. 8:17-CV-209
6 vs.) COPY
7 U-PARK, INC.,)
8 Defendant.) DEPOSITION OF
) JEREMY E. SWENSON, CSP
)

)

9 THE DEPOSITION OF JEREMY E. SWENSON, CSP,
10 taken before Stephanie J. Cousins, Certified
and Registered Professional Reporter,
commencing at 1:12 p.m., November 13, 2018, at
11 Woodke & Gibbons, 619 North 90th Street, Omaha,
Nebraska.

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25 Reported by: Stephanie J. Cousins, R.P.R.

1 I N D E X

2 Examination By: Page

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4 EXHIBITS

5 Exhibit No. Page

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1 JEREMY E. SWENSON, CSP,
2 called as a witness, having been first
3 duly sworn, testified as follows:

4 DIRECT EXAMINATION

5 BY MR. COOK:

6 Q. State your name for the record,
7 please.

8 A. Jeremy Swenson.

9 Q. Sir, my name is Guy Cook. We're here
10 today for the purposes of taking your
11 deposition. I represent Tonia and Dennis
12 Ackerman in a case pending in the United States
13 District Court for the District of Nebraska.
14 You've just taken an oath from the court
15 reporter. She's an Officer of the Court,
16 authorized to administer oaths, you understand,
17 subject to the penalties for perjury should you
18 give false statements here today?

19 A. Yes.

20 Q. I know from looking at your materials
21 that you've given many depositions in the past,
22 and so I won't trouble you with what the rules
23 of a deposition are. You know what they are;
24 right?

25 A. Yes.

1 Q. I understand that you've testified in
2 court one time. Has that changed?

3 A. No.

4 Q. Okay. Have you ever been recognized
5 or declared an expert in the U.S. District
6 Court for the District of Nebraska?

7 A. No. Not to my knowledge.

8 Q. And tell me how many depositions
9 you've given since you started the consulting
10 business ten years ago.

11 A. Around sixteen.

12 Q. And how many of those have been for
13 the plaintiff and how many for the defense?

14 A. It's approximately 60 percent
15 plaintiff, 40 percent defense.

16 Q. Do you still have copies of those
17 transcripts?

18 A. No.

19 Q. Do you keep any kind of a log of your
20 testimony?

21 A. Yes.

22 Q. Okay. Have you got that available
23 that you could provide to Mr. Gibbons to
24 provide to me?

25 A. Yes.

1 Q. I'd ask that you do that. And through
2 the course of our deposition today, here as a
3 convenience to you and to me also, if I ask for
4 something, we'll ask our court reporter to list
5 that at the beginning of the transcript, so
6 that we can easily find what it is that we've
7 listed as action things we're trying to follow
8 up on. Okay?

9 A. Okay.

10 Q. Do you have any kind of a file that
11 relates to this matter?

12 A. Yes.

13 Q. And did you bring that with you today?

14 A. No.

15 Q. What's contained in the file?

16 A. The documents that are listed on the
17 back of my report. So just case files, some
18 photos, notes. I think that's it.

19 Q. When were you retained in this matter?

20 A. It would have been in the summer. So
21 it would have been sometime around August --
22 July or August, I believe.

23 Q. That would be confirmed in your file?

24 A. Yes.

25 Q. And as I understand it -- and you

1 correct me -- you charge different rates for
2 review as contrasted with testimony; is that
3 right?

4 A. Yes.

5 Q. And is it 290 for testimony?

6 A. It's 295, yes.

7 Q. 295 for testimony?

8 A. Yes.

9 Q. And that would be in a deposition or
10 in court?

11 A. Yes.

12 Q. And then it's something less than that
13 for file review or other work?

14 A. Yes.

15 Q. And what is that?

16 A. It's 195.

17 Q. How many hours do you have in this
18 case up to this point?

19 A. I don't recall the exact number. I'd
20 have to look on my billing.

21 Q. Okay. What would be your best
22 estimate?

23 A. Twelve hours.

24 Q. And some of that would be file review,
25 or most of it would be?

1 A. Yes.

2 Q. And the site visit that you did this
3 summer, is that at the 195 rate?

4 A. Yes.

5 Q. Have you been paid for these
6 approximate twelve hours?

7 A. Yes.

8 Q. Other than perhaps testifying should
9 there be a trial in this case, if the Court
10 permits that, do you intend to have to incur
11 any other work or hours on the case?

12 A. Not unless more information becomes
13 available.

14 MR. COOK: This report we will
15 mark as an exhibit that you generated. And I
16 think our next exhibit is 26. Does that sound
17 right?

18 MR. GIBBONS: Sounds right.

19 (Exhibit 26 was marked for
20 identification by the reporter.)

21 BY MR. COOK:

22 Q. Our court reporter has marked as
23 Exhibit 26 your seventeen-page submission, and
24 you have that in front of you. Is that right,
25 sir?

1 A. Yes.

2 Q. So we're going to talk about that
3 periodically as we have our conversation today.

4 The report has a date of August 30th. How many
5 days before that do you think you were
6 retained?

7 A. I don't recall the exact number, but
8 it would have been 30 or 60 days, probably,
9 before that.

10 Q. And you did conduct an examination of
11 the property on August 16th, at least according
12 to your report; is that correct?

13 A. Yes.

14 Q. And can you give us any sense of how
15 many days before that you were retained?

16 A. I think I already answered that. It
17 was somewhere in the 30 to 60 days before that,
18 I believe.

19 Q. Okay. So how did you first learn
20 about this case?

21 A. I was contacted by Mike, and --

22 Q. Mr. Gibbons?

23 A. Yes.

24 Q. And what did he tell you?

25 A. He told me that there was a

1 slip-and-fall that occurred in a parking lot.

2 Q. And what did he ask you to do?

3 A. He asked me to review the case file,
4 look at everything, look at the photos, and
5 give him my opinions about the case.

6 Q. Other than him telling you this was a
7 slip-and-fall and asking for your opinions, did
8 he offer any commentary or description of the
9 case or his view of the case?

10 A. We did discuss -- I mean, we did
11 discuss it that -- as far as his relevant
12 details, and then I reviewed the files.

13 Q. I'll be very specific. Did he say
14 anything along the lines that, Mr. Swenson, we
15 consider this case to be defensible? We don't
16 think there's any liability? We'd like you to
17 support that position? Anything in that family
18 of conversation?

19 A. No, no, no. He was asking me to be
20 objective.

21 Q. Okay. He actually said that?

22 A. Well, I don't recall if he said the
23 exact words, but he wanted my opinions on the
24 case.

25 Q. Okay. Have you worked with Mr.

1 Gibbons before?

2 A. No.

3 Q. Have you worked with his law firm
4 before?

5 A. No.

6 Q. Do you know how you were located as a
7 possible expert in the case?

8 A. I do not.

9 Q. Now, as I understand it, you said
10 earlier that you've worked in both defense
11 cases and plaintiff cases, but the ledger sort
12 of leans a little more in favor of plaintiff
13 cases. Is that right?

14 A. Yes.

15 Q. In the case that you testified in
16 court, what case was that?

17 A. I don't remember the name of the case.

18 Q. Okay. That's fair. Where was the
19 case pending?

20 A. It was in Independence.

21 Q. Missouri?

22 A. Yes.

23 Q. And who was the lawyer you worked
24 with?

25 A. I don't remember his name. It was two

1 or three years ago.

2 Q. Would this be on your log of
3 testimony --

4 A. Yes.

5 Q. -- that you're going to provide to us
6 or you'll look for?

7 A. Yes.

8 Q. You do have such a log. Did you say
9 that earlier?

10 A. Yes, I do.

11 Q. And was that for the plaintiff or the
12 defense?

13 A. That was for plaintiff.

14 Q. And what was the verdict?

15 A. The plaintiff lost.

16 Q. Okay. So the jury rejected your
17 expert testimony?

18 MR. GIBBONS: Object to the form
19 of the question.

20 A. No, they didn't reject my expert
21 testimony. I don't know all the details of the
22 case. I mean, the case went on three or four
23 or five days. I mean, there's many aspects to
24 a case. So I don't know all the rest of the
25 details of the case.

1 Q. Is it fair to say that you were there
2 to testify in support of the plaintiff's claim
3 that there was liability against the property
4 owner?

5 A. Yes.

6 Q. And I take it, given your resume, that
7 it had something to do with snow or ice
8 removal?

9 A. Yes.

10 Q. And is it fair to say your testimony
11 was that the property owner, or whoever was in
12 charge of snow and ice removal, failed to
13 exercise reasonable care?

14 A. Yes.

15 Q. And on that subject, the jury said no;
16 is that right?

17 MR. GIBBONS: Form of the
18 question, foundation.

19 Go ahead.

20 A. I don't know -- I wasn't privy to the
21 jury's deliberation or documentation, or I
22 didn't see any of that. I just got called in
23 and testified and left, and wasn't informed of
24 all that.

25 0. Right. But you know enough, given

1 your earlier testimony, that the jury did not
2 rule in favor of the plaintiff seeking to hold
3 the property owner liable; correct?

4 A. Yes.

5 Q. These sixteen cases that you've given
6 testimony in, I would assume that that does not
7 encompass all the cases you've consulted in for
8 litigation purposes. Is that right?

9 A. That's correct.

10 Q. There might be some cases where you
11 were asked to consult and maybe provide a
12 report, but never gave testimony?

13 A. Yes.

14 Q. So let's see if we can get the
15 universe of the cases that you've done forensic
16 work in. What would that number be,
17 approximately?

18 A. I've never counted them. So I don't
19 know the exact number. I know it's at least
20 fifty.

21 Q. Okay. But sixteen you've given sworn
22 testimony?

23 A. Yes.

24 Q. And one, you've testified in court?

25 A. Yes.

1 Q. And given what you've represented here
2 as your resume or curriculum vitae, is it fair
3 to say that those sixteen cases that you gave
4 testimony in had to do with the subject of
5 whether there was adequate or inadequate snow
6 and ice removal?

7 A. Yes.

8 Q. And is it also fair to say that none
9 of those cases involved, say, a defective
10 condition, as opposed to the presence of snow
11 or ice?

12 A. What do you mean by defective
13 condition?

14 Q. Well, let me just grab an example out
15 of the air. You never testified in a case
16 where someone stepped in a hole and fell and
17 broke their ankle as they were heading to, say,
18 an office building?

19 A. No.

20 Q. Or someone tripped over a rise in
21 concrete as they were walking down a sidewalk?

22 A. No.

23 Q. That's what I mean by defective
24 condition.

25 A. Okay.

1 Q. Okay. And so to go back to my
2 question, then, it's fair to say that those
3 sixteen cases you've given testimony in had to
4 do with the adequacy or inadequacy of snow and
5 ice removal, and not whether there was a
6 defective condition present; correct?

7 A. Correct.

8 Q. Now, we're going to talk about your
9 claims of expertise, but is it fair to say that
10 you hold yourself out as an expert in proper
11 snow and ice removal?

12 A. Yes.

13 Q. And as such, you've offered opinions
14 and done forensic work in litigation?

15 A. Yes.

16 Q. So do you know -- can you tell me in
17 your own words what the duty is that a property
18 owner or management company has regarding
19 protecting invitees from injury on their
20 premises.

21 A. It sounds like more of a legal
22 conclusion. I'm not an attorney.

23 Q. Okay. I'm not asking for any legal
24 opinions, because you don't -- you're not an
25 attorney. But I'd like for you to tell me in

1 your own words what it is that you believe the
2 duty is of a property owner to someone who
3 comes onto their property as it relates to the
4 removal of snow and ice.

5 MR. GIBBONS: Form and
6 foundation.

7 A. I believe there's a duty to provide
8 reasonable snow and ice removal services.

9 Q. Do you agree that a property owner or
10 a manager of the property that's been delegated
11 by the property owner has a duty to realize
12 conditions that an entrant -- someone who's a
13 lawful entrant might not anticipate?

14 MR. GIBBONS: Form and
15 foundation.

16 A. I do think it's important to be aware
17 of conditions of snow and ice on your property,
18 but it's impossible to be aware of it 100
19 percent of the time.

20 Q. Right. I didn't ask that. What I'm
21 asking is, do you agree with me that a property
22 owner or someone charged with removing snow and
23 ice has a duty to remove risks of harm that a
24 reasonable person might not discover or
25 realize?

1 MR. GIBBONS: Form and
2 foundation, asked and answered.

3 A. I think within reason, yes.

4 Q. And I take it, based upon your
5 reported experience in snow and ice removal,
6 that you would agree that someone who's in the
7 business of removing snow and ice is in a
8 better position to know what the risks are
9 presented to persons regarding snow and ice?

10 MR. GIBBONS: Form and
11 foundation.

12 A. Yes.

13 Q. All right. Let's talk about this
14 particular case. When you visited the site on
15 August 16th, I believe is what you say, was
16 anyone with you?

17 A. I did meet Mr. Gibbons there
18 initially.

19 Q. So Mr. Gibbons met you at the U-Park
20 lot where this incident occurred with Ms.
21 Ackerman?

22 A. Yes.

23 Q. And was he there during your
24 inspection of the property?

25 A. Yes.

1 Q. How long did the inspection take?

2 A. I think it was around thirty minutes.

3 Q. We have some pictures that we might
4 talk about here that are part of your report.

5 Are those pictures you took on that day?

6 A. Yes.

7 Q. Are there any other pictures that you
8 took that are not produced as part of your
9 report?

10 A. No.

11 Q. Did Mr. Gibbons take any pictures?

12 A. Not that I'm aware.

13 Q. So tell me what happened when you got
14 there on the -- Did I have that date right,
15 August 16th?

16 A. Let me look. Yes. August 16th, yes.
17 I arrived and looked at the parking lot,
18 examined the area where the snow was pushed
19 based on the photographs that were provided in
20 the case, and examined the area of the
21 slip-and-fall based on the photographs that
22 were provided. And just looked at the layout
23 of the property.

24 Q. Did Mr. Gibbons point out to you where
25 the area was where Ms. Ackerman fell?

1 A. Yes.

2 Q. And did he offer any narrative as to
3 what her testimony was, in a deposition or
4 otherwise?

5 A. Not that I recall.

6 Q. Did you look at any other parts of the
7 lot, other than the area around Parking Stall
8 153?

9 A. I was mainly focused on the area where
10 the snow was pushed up by the fence, and the
11 general area in relationship to slope that
12 could be an issue, potentially, with ice
13 melting or freezing. And I was examining those
14 areas.

15 Q. So let's see if we can orient for the
16 purposes of our discussion. You correct me if
17 I don't have it right. The Stall 153 is more
18 or less on the south side of the lot?

19 A. Yes.

20 Q. And the Mattress Factory is more or
21 less on the west side of the lot?

22 A. Yes.

23 Q. And the walkway area and the area
24 where some snow is pushed when there's snowfall
25 is in the east or southeast corner of the lot?

1 MR. GIBBONS: Object to the form
2 of the question. Did you say walkway?

3 Q. There's an exit out of the lot; right?
4 In the southeast corner?

5 A. Yes.

6 Q. Okay. And is the snow more or less
7 pushed, in your opinion, towards the southeast
8 or east end of the lot?

9 A. Yes. It appeared to be that way in
10 the photos, and that's where it was pushed, is
11 up against the fence -- fence line.

12 Q. Now, I saw in your report -- Let me
13 see if I can find it. You say on Page 4 under
14 Paragraph 1, Opinions and Conclusions, that the
15 parking lot was in excellent condition. And
16 then you later on in your report also talk
17 about the general condition of the parking lot.
18 Is that still your testimony?

19 A. Yes. My reference here was to the
20 overall snow condition of the parking lot based
21 on the photographs that I reviewed.

22 Q. And you say on Page 10 that it's your
23 opinion that the area of the parking lot where
24 the slip-and-fall incident occurred was not in
25 poor condition. Is that still your testimony?

1 A. Yes, that's my opinion.

2 Q. And you say just above that also that
3 it is your opinion that the U-Park lot is in
4 average to above average condition for an
5 asphalt parking lot. Is that still your
6 testimony?

7 A. Yes.

8 Q. Now, you don't have any special
9 expertise in asphalt repair or the application
10 of slurry or new asphalt or how to maintain an
11 asphalt parking lot, do you?

12 A. No. But I have examined thousands and
13 thousands of parking lots and asphalt parking
14 lots in my career; and I do own a commercial
15 building with an asphalt parking lot. So I'm
16 very familiar with asphalt parking lots.

17 Q. Right. I can tell you in my 62 years,
18 I've parked in thousands of asphalt parking
19 lots myself. What I'm asking you, sir, is you
20 don't hold yourself out as an expert in the
21 maintenance, the proper maintenance protocols,
22 or how to maintain the asphalt of an asphalt
23 parking lot; correct?

24 MR. GIBBONS: Object to the
25 form. Outside of snow and ice removal, of

1 course.

2 Q. Right. We're talking about outside of
3 snow and ice removal. You're not here to tell
4 us you're an expert on asphalt parking lots,
5 how they should be maintained, how they should
6 be repaired, those kinds of things?

7 MR. GIBBONS: Form and
8 foundation.

9 A. No. I don't consider myself to be an
10 asphalt parking lot expert.

11 Q. For example, you talk about in your
12 report the best practices for snow and ice
13 removal and standard of care and so on; right?

14 A. Yes.

15 Q. But you're not here to offer any
16 opinions on the best practice for asphalt
17 parking lot maintenance?

18 MR. GIBBONS: Form of the
19 question.

20 A. No.

21 Q. Okay. Or what sort of preventive
22 maintenance protocols ought to be in place;
23 correct?

24 MR. GIBBONS: Object to the form
25 of the question.

1 A. No.

2 Q. Other than this one time on the 16th
3 of August, a couple weeks before your report,
4 when you were at the site of the fall with the
5 defense lawyer, have you been to the U-Park
6 parking lot on any other occasion?

7 A. I went -- I went there today and
8 looked at it today. So other than that, no.

9 Q. How long were you there?

10 A. Today?

11 Q. Yes, sir.

12 A. Probably ten, fifteen minutes.

13 Q. Did you take any pictures?

14 A. Yes.

15 Q. And where are those?

16 A. It's on my phone.

17 Q. Can I see those?

18 A. Yeah.

19 Q. While you're looking for that, did you
20 observe anything that changes your opinions in
21 this case?

22 A. No. I was interested because it had
23 just recently snowed here on Friday, and so I
24 was -- I went to the lot to look at where the
25 snow had been pushed in the lot to see if there

1 was melting or freezing that had occurred down
2 near the area of the slip-and-fall location. I
3 took one photo. So that's the photo
4 (Indicating).

5 Q. All right. So you just took one
6 picture?

7 A. Yeah.

8 Q. And this is a picture of Stall 153
9 looking generally east; is that right?

10 A. Yes.

11 Q. And this is something I'd ask that you
12 supply to us. So I'd request that, this
13 photograph.

14 Looking at this picture on your
15 phone, and maybe revealing some other pictures,
16 you would acknowledge, would you not, that just
17 to the right of the No. 153, near the end of
18 where the car is parked in that stall, that
19 there is a discoloration and sort of a channel
20 that goes across the parking lot?

21 MR. GIBBONS: Form of the
22 question.

23 A. What channel are you talking about? I
24 don't -- what do you mean?

25 MR. COOK: Okay. Would you read

1 back the question, please.

2 (Requested portion of the record
3 was read.)

4 THE WITNESS: Okay. Yes, I can
5 see that.

6 BY MR. COOK:

7 Q. And what do you attribute that to?

8 A. That is from water running across the
9 lot at some point.

10 Q. I'll give you your phone back. No
11 other pictures besides that one?

12 A. No.

13 Q. Okay. And your decision to view the
14 property, was that your own, or did Mr. Gibbons
15 say you should go look at it before you give
16 your testimony?

17 A. I got here early, and so I thought
18 that would be good to go do, based on the snow
19 that had come in.

20 Q. What do you think of the snow and ice
21 removal on this property?

22 MR. GIBBONS: Well, are you
23 talking about my property?

24 MR. COOK: Yeah.

25 MR. GIBBONS: Well, that's

1 irrelevant.

2 THE WITNESS: It looks fine to
3 me.

4 BY MR. COOK:

5 Q. What about the big pile of ice melt
6 that's on the sidewalk when you come in here?
7 Does that bother you?

8 A. You know, I didn't really notice that.

9 Q. Okay. Have you spoken with the
10 Defendant in this case, Mr. Schmitt?

11 A. Yes.

12 Q. When was that?

13 A. I believe there was a phone conference
14 call that I briefly had with him and Mr.
15 Gibbons just discussing his practices of snow
16 and ice removal.

17 Q. Okay. Give me an approximate date of
18 that.

19 A. I don't recall the exact date, because
20 I didn't record it or anything like that. It
21 would have been sometime in the summertime
22 before I did my report.

23 Q. Okay. And did you make notes of that
24 conversation?

25 A. No.

1 Q. No notes?

2 A. No.

3 Q. None?

4 A. No. I just listened to what he said,
5 and it was -- it lined up with the case files.

6 Q. Why didn't you take any notes?

7 A. I didn't feel I needed to.

8 Q. How long was that conversation?

9 A. I don't recall. It wasn't real long.

10 Q. Any other interactions with Mr.
11 Schmitt?

12 A. No.

13 Q. You've read his deposition?

14 A. Yes.

15 Q. Is there anything in his deposition
16 that you disagree with or question?

17 A. Not that I can recall.

18 Q. Put it another way, are you critical
19 of anything that Mr. Schmitt said in his
20 deposition?

21 A. There's nothing that sticks out to me,
22 no.

23 Q. Let me shift gears for a moment, and
24 we'll come back to your report. As I
25 understand it, you yourself have been the

1 subject or your company has been sued; is that
2 right?

3 A. Yes.

4 Q. And you've been sued for alleged
5 failure to properly remove snow and ice?

6 A. Yes.

7 Q. Where were those lawsuits?

8 A. In Kansas, Kansas City area.

9 Q. How many times have you been sued for
10 allegations of failure to properly remove snow
11 and ice?

12 A. I don't know the exact number, because
13 I don't deal with -- I have a general manager
14 who deals with that. And so I'm aware of it,
15 but I don't know the exact number.

16 Q. Okay. Give me your best estimate.

17 A. Maybe eight.

18 Q. Have any of those cases gone to trial?

19 A. No.

20 Q. Of those approximate eight, give or
21 take, have you paid any money or has your
22 manager or whoever would provide
23 indemnification paid any money in those
24 lawsuits?

25 A. We turn it over to insurance.

1 Insurance handles it all. We don't know what
2 they do exactly.

3 Q. Have you given testimony or have any
4 of your workers given testimony in those
5 lawsuits?

6 A. Yes.

7 Q. When you say yes, would that be you?
8 You've given testimony?

9 A. Yes.

10 Q. Okay. And how many times?

11 A. I don't recall the exact number.
12 Maybe four.

13 Q. Is that in addition to the four
14 depositions you've given as an expert?

15 A. Yes.

16 MR. GIBBONS: Sixteen.

17 Q. Excuse me. Sixteen.

18 A. Yes. In addition to the sixteen, yes.

19 Q. So I would assume somewhere, that you
20 have a record of these lawsuits?

21 A. No.

22 Q. No record. Do you have copies of the
23 depositions you've given four times?

24 A. No.

25 Q. Did you have the same insurance

1 company for this period of time that the eight
2 lawsuits, give or take, were filed?

3 A. No. It changes.

4 Q. Okay. Who do you presently have
5 insurance with?

6 A. I don't know the names. I don't
7 handle that part of it.

8 Q. So as you sit here today, you can tell
9 me under oath that you don't know whether any
10 money's been paid in any of these lawsuits
11 against your company for failure to remove snow
12 and ice. Is that your testimony?

13 A. I do know that they've been settled.
14 I don't know exact numbers of all of them, no.

15 Q. Okay. And have the lawsuits been
16 against you personally, or against Snowmen,
17 Incorporated, or what have they been?

18 A. I think it's Snowmen, Incorporated.

19 Q. So any sort of a search of the dockets
20 in the Greater Kansas City Area would locate
21 those lawsuits?

22 A. Yeah. I don't know how attorneys
23 exactly do that, but it's -- I'm sure it's
24 public record somewhere.

25 Q. Okay. So you said earlier they were

1 in Kansas City. Is that Kansas City, MO, or
2 Kansas City, Kansas?

3 A. I don't know.

4 Q. So of the eight or so lawsuits, are
5 there any that stick out in your mind as to
6 what the facts were?

7 A. No. It's been -- it's been quite a
8 while. I haven't been involved in one for
9 quite a while.

10 Q. When was the last lawsuit?

11 A. Well, I don't know the exact -- I
12 mean, I don't know the exact one. My general
13 manager handles all of that for the company.

14 Q. What's his name?

15 A. Mike Hathcock.

16 Q. Spell the last name for the court
17 reporter.

18 A. H-A-T-H-C-O-C-K.

19 Q. And so he would know when the last
20 lawsuit was?

21 A. Yes.

22 Q. Let's see if we can get it this way.
23 As I understand it, you formed your consulting
24 company in 2008.

25 A. Yes.

1 Q. Have you had lawsuits against Snowmen,
2 Inc. after 2008?

3 A. Yes.

4 Q. And the last lawsuit for allegations
5 of failure to properly remove snow and ice
6 would be approximately when, your best
7 estimate?

8 A. Restate the question.

9 Q. All right. The last lawsuit or the
10 most recent lawsuit against Snowmen, Inc. would
11 have been brought approximately when, your best
12 estimate?

13 A. Two or three years ago, to my
14 knowledge.

15 Q. Okay. Let's talk about your
16 schooling. You do not hold a college degree;
17 correct?

18 A. Correct.

19 Q. You did attend community college, but
20 did not graduate; correct?

21 A. Correct.

22 Q. And this certification that you speak
23 about in your report -- I want to make sure I
24 get it correct -- you hold yourself out as a
25 certified snow professional?

1 A. Yes.

2 Q. And when did you obtain that
3 designation?

4 A. I would say it was about five years
5 ago. So it would have been 2013 or so.

6 Q. Okay. And as I understand it, you
7 took a test on a computer for that
8 certification?

9 A. Yes.

10 Q. Is that a multiple choice, then?

11 A. Yes.

12 Q. How many questions?

13 A. I believe it was 200.

14 Q. How long was the test and how long did
15 they give you to take the test?

16 A. Three hours.

17 Q. Was it an open book?

18 A. No.

19 Q. Now, do you still have the study
20 materials that you studied to prepare for that
21 test?

22 A. SIMA does provide training modules for
23 the different modules, and our company
24 does -- did purchase those for our company's
25 use.

1 Q. Right. So my question is, the study
2 material that you bought and that you studied
3 for the test, do you still have those?

4 A. I believe that -- I personally do not.

5 Q. But your company does?

6 A. I think the company does, yes.

7 Q. I'd ask that you collect those and
8 produce those. How much does it cost to get
9 that designation?

10 A. I don't remember. I don't remember
11 the cost. There is a price, a fee you pay. I
12 don't remember the exact amount.

13 Q. This company that you have, if I have
14 it correct, is called Snowmen, Incorporated?

15 A. Yes.

16 Q. Is that a copyright or a trademark?

17 A. Yes.

18 Q. And that was created in 2005, as I
19 understand it.

20 A. Yes.

21 Q. And you'd been in the mulch business
22 with some fellows and decided that you didn't
23 want to be a part of that, and they didn't want
24 to be part of snow removal; and so you parted
25 ways?

1 MR. GIBBONS: Object to the form
2 of the question.

3 Q. Do I have that correct?

4 MR. GIBBONS: Same objection.

5 A. Well, that's -- that seems kind
6 of -- I mean, I did have partners. We ended
7 up buying each other out and moving on.

8 Q. Uh-huh. Who were those partners?

9 A. Tom Cannon and Rick Ractor.

10 Q. Do they still operate a business in
11 the Greater Kansas City Area?

12 A. No.

13 Q. Now, you tell us in your report that
14 you work full-time in the snow and ice removal
15 industry. Is that true?

16 A. Yes.

17 Q. At least in this part of the country,
18 snow and ice is usually sometimes October,
19 maybe, to late April. What do you do the rest
20 of the time?

21 A. We do ongoing training. We do
22 customer follow-up. We do events. We do --
23 our sales season starts in June. We start
24 selling accounts in June. And, you know, our
25 snow removal operation is so large that by the

1 time the winter is over -- we don't declare the
2 winter to be over until April 15th, and then we
3 have a process of shutting down the winter. By
4 the time we have the winter shut down, it's
5 time to start up again.

6 Q. What are these events you mentioned?

7 A. We are members of BOMA, the Building
8 Owners and Managers Association, IREM,
9 Institute of Real Estate Management. We
10 sponsor -- or we go to their golf tournaments
11 and sponsor golf tournaments and go to
12 luncheons and different events.

13 Q. And do you still have about fifteen
14 employees?

15 A. Yes.

16 Q. Are they full-time employees or
17 seasonal?

18 A. Full-time.

19 Q. So those people are working in the
20 summer also?

21 A. Yes.

22 Q. And tell us your physical location of
23 your business.

24 A. 11940 Cartwright Avenue.

25 Q. Is that like a warehouse facility or

1 something?

2 A. No. It's a custom snow and ice
3 removal facility that I own.

4 Q. Okay. But it's a commercial area?

5 A. Yes.

6 Q. You tell us in your report that you're
7 also involved with something called SIMA, Snow
8 and Ice Management Association. Is that right?

9 A. Yes.

10 Q. And how many members are there in
11 SIMA?

12 A. Last I knew, there was 20,000 plus.

13 Q. So in the properties that you handle
14 for snow and ice removal, can you tell us
15 approximately what your average revenue is for
16 that work?

17 A. It varies depending on the contract
18 and depending on the season.

19 Q. Right. But an average.

20 A. For Snowmen?

21 Q. Yes, sir.

22 A. It's around six million dollars a
23 year.

24 Q. All right. And then for Swenson
25 Consulting, again, I'm sure that varies, but on

1 average, what is the income for that consulting
2 business?

3 A. It's around 100,000.

4 Q. Then specifically within that
5 consulting business, how much revenue annually,
6 approximately, from doing forensic work like in
7 this case?

8 A. All of it.

9 Q. Okay. I see in your report that you
10 say that you've managed and overseen snow and
11 ice removal on over 10,000 acres of parking lot
12 pavement and over 28,000,000 square feet of
13 sidewalk. How did you calculate that number or
14 those numbers?

15 A. We have a total of our -- total number
16 of acres that we service every winter season,
17 and how many million square feet of sidewalks
18 that we service in a winter season.

19 Q. I was interested in and I was not sure
20 what you were saying when you said you're an
21 expert on snow and ice removal contract
22 analysis. What does that mean?

23 A. I prepare thousands and thousands of
24 contracts, snow and ice removal contracts,
25 every year. So I examine contracts, snow and

1 ice removal contracts, prepare them and examine
2 them. Thousands of them annually.

3 Q. All right. Let's go back to the facts
4 of this case. You set forth in your report the
5 weather data from the National Oceanic and
6 Atmospheric Administration for February 2016 in
7 Omaha; is that right?

8 A. Yes.

9 Q. And do you know where that recording
10 station is in relationship to where the fall
11 was?

12 A. No.

13 Q. You do know from your experience that
14 weather conditions can vary and that an
15 official reporting station might not always
16 report accurately the conditions at another
17 location?

18 MR. GIBBONS: Form and
19 foundation.

20 A. Yeah, it's possible there can be some
21 variance.

22 Q. And you have no way of knowing there
23 was a variance from what is in the NOAA report
24 and what was actually at the site of the fall;
25 correct?

1 MR. GIBBONS: Form and
2 foundation.

3 A. Correct.

4 Q. Okay. But let's talk about what you
5 do have in your report. You say that the NOAA
6 report shows it snowed 4.9 inches on February
7 2nd, an additional .6 inches of snow on
8 February 5th, and again on February 7th, and
9 that the record reflects a high temperature of
10 37 degrees on February 10th. So can we agree
11 that prior to Ms. Ackerman's fall, there was
12 snow that was recorded in the Omaha area and
13 that there was some thawing and freezing?

14 MR. GIBBONS: Form of the
15 question.

16 A. Yes, I do believe that happened.

17 Q. Correct me if I'm wrong here, sir, but
18 you say an additional .6 inches of snow in
19 Omaha on February 5th and again on February
20 7th. Is that 1.2 total?

21 A. I would have to look at the record --
22 the actual record. I don't have it in front of
23 me.

24 Q. Okay. But the way I read that is
25 you're saying .6 inches of snow on February 5th

1 and again on February 7th.

2 A. Uh-huh.

3 Q. Is that designed to say that on those
4 two dates, there was about .6 inches of snow
5 precipitation?

6 A. My memory -- if my memory serves me
7 right, there was .6 inches and there was a
8 trace, I think, on the 7th. So it was just a
9 little tiny -- like a trace, if I remember
10 right.

11 Q. Okay. But we have the official
12 records. We can rely upon those as what was at
13 least recorded at the recording station. Mr.
14 Gibbons is graciously handing me the report.

15 So you correct me, but it does
16 look to me, looking at the report on both of
17 those dates, there was .6 inches of snow -- new
18 snow in that column on both those dates.

19 A. Yes. That is correct.

20 Q. Okay. So math was never my strong
21 suit, but if we add the 4.9 inches on February
22 2nd, the .6 inches on February 5th and the .6
23 inches on February 7th, we get to over a half a
24 foot of snow that had fallen prior to Ms.
25 Ackerman's fall; right?

1 A. Yes. That's over a long period with
2 temperatures also rising well above freezing,
3 up to 45 degrees on the 7th.

4 Q. What was the date of this fall?

5 A. It was on the 13th.

6 Q. So basically, over a ten-day period?

7 A. Yes.

8 Q. And so just so we're communicating,
9 then, over this approximate ten-day period,
10 including the day of her fall, there had been
11 approximately a foot -- over a foot of snow in
12 the Omaha area prior to her fall; right?

13 A. It was --

14 MR. GIBBONS: Form of the
15 question.

16 A. It was six inches.

17 Q. Half a foot.

18 A. Yes.

19 Q. Okay. So let me restate that. In the
20 days leading up to her fall, the approximate
21 ten days prior, there had been over a half a
22 foot of snow in the Omaha area; correct?

23 MR. GIBBONS: Form of the
24 question.

25 Go ahead.

1 A. Yes.

2 Q. Okay. Thank you. You indicate that
3 you reviewed the Defendant's Answers to
4 Plaintiffs' Interrogatories; is that right?

5 A. Yes.

6 Q. Did you accept all those Answers as
7 true?

8 A. Yes.

9 Q. Do you know anything about Mr. Joseph
10 Schmitt's background?

11 A. No.

12 Q. Do you know if he belongs to any of
13 these associations you belong to?

14 A. I do not.

15 Q. You do know that he uses a Road Runner
16 deicer?

17 A. Yes.

18 Q. What sort of deicer does the Snowmen
19 company use?

20 A. We use -- Road Runner is magnesium
21 chloride. So we do use magnesium chloride as
22 well. We use a number of different products.

23 Q. Do you also use sand?

24 A. We do not use sand, no.

25 Q. Why not?

1 A. We find sand to be -- it doesn't melt
2 snow or ice, and it ends up causing a problem
3 with -- people actually slip on the sand.

4 Q. Have you used sand in the course of
5 doing snow and ice removal?

6 A. Not at Snowmen, no.

7 Q. Some people do use sand; right?

8 A. Some, yes.

9 Q. Do you know if Mr. Schmitt used sand
10 on any of the parking lots that he operated,
11 including the one where Ms. Ackerman fell?

12 A. I'm not -- I just -- I don't believe
13 he did. I'm -- I know he didn't on the lot
14 where the slip-and-fall occurred.

15 Q. Now, you say that Exhibit 5 shows a
16 picture of Road Runner deicer and a black ice
17 area. And I'll show you Exhibit 5, so you're
18 not disadvantaged. I'm handing you Exhibit 5.
19 Do you see that (Indicating)?

20 A. Yes.

21 Q. And we can agree that what's depicted
22 in Exhibit 5 is a black icy area?

23 A. Yes.

24 Q. All right. And I trust that --

25 Sorry. I didn't mean to take that back from

1 you so quick -- that you would also agree with
2 me that that black ice area shown in the Stall
3 153 is certainly big enough for someone to slip
4 and fall on?

5 MR. GIBBONS: Form and
6 foundation.

7 A. I think, yeah, it's possible.

8 Q. Okay. Let me shift gears again just
9 to kind of give you an introduction to what
10 we're going to talk about. In reviewing the
11 materials in this case, including the testimony
12 of Mr. Schmitt, the records, including the
13 Interrogatory Answers, and drawing upon your
14 claimed experience in the area of snow and ice
15 removal, do you have any recommendation for
16 improvement for Mr. Schmitt and U-Park for
17 maintenance of their parking lot in the future?

18 MR. GIBBONS: Form and
19 foundation.

20 A. What do you mean by maintenance of the
21 parking lot in the future?

22 Q. Snow and ice removal.

23 A. Oh, snow and ice removal. No, I don't
24 find anything that he did to be unsatisfactory
25 or unreasonable in regards to snow and ice

1 removal.

2 Q. And to be specific, so you and I are
3 communicating, do you have any suggestions for
4 him to make the parking lot safer for patrons
5 with regard to snow and ice removal?

6 MR. GIBBONS: Form and
7 foundation.

8 A. I analyzed the case based on, you
9 know, the temperatures at the time, the photos,
10 the amount of snow that had fallen. You know,
11 six days earlier was the latest that any snow
12 had fallen. Looking at the temperatures. And
13 I don't believe there's anything that he could
14 have done to be more reasonable, no.

15 Q. What if he'd have walked the lot and
16 saw that black ice and put down the ice melt
17 prior to Ms. Ackerman coming across that part
18 of the parking lot? Would that have been
19 something that would have made the condition
20 safer?

21 MR. GIBBONS: Form of the
22 question.

23 A. I think in a perfect scenario, if he
24 knew exactly when that circle happened and when
25 it froze, I think it could have been good if he

1 would have known the exact time, yes.

2 Q. Okay. It's his parking lot; right?

3 A. Yes.

4 Q. And you saw in the testimony that he
5 at least one time a day walks the parking lot?

6 A. Yes.

7 Q. And some might suggest that's to see
8 if people have paid. Some other people might
9 suggest that's to do an inspection. But you
10 didn't see any testimony that he walks it more
11 than once; correct?

12 A. It's my understanding that he was
13 working there the day of the incident.

14 Q. Right. But he only walked the lot
15 once?

16 A. As far as I know, that's correct.

17 Q. And had he walked the lot and observed
18 this black ice that's shown in Exhibit 5, would
19 it have been reasonable for him to apply the
20 Road Runner deicer that he did after the fall
21 before the fall?

22 MR. GIBBONS: Form and
23 foundation, calls for speculation.

24 A. Yeah. He seems to be very conscientious
25 in his snow and ice removal duties. And I

1 think if he would have seen it, he probably
2 would have put deicer on it, is my opinion.

3 Q. Okay. That would have been
4 reasonable?

5 MR. GIBBONS: Form and
6 foundation, calls for speculation.

7 A. Yeah, that would be reasonable. But
8 it's -- I don't believe that it's also
9 reasonable to have 100 percent of an entire
10 parking lot 100 percent clear all of the time,
11 and I don't believe it's reasonable for a
12 property owner to have that expectation of
13 their parking lot.

14 Q. Now, let's talk about a different
15 subject, and that is the subject of birdbaths.
16 And you've included in your report what you
17 claim to be a photograph of birdbaths; is that
18 right?

19 A. Yes.

20 Q. And you would agree with me, would you
21 not, that there are variant degrees of
22 birdbaths?

23 A. Yes.

24 Q. One that can be quite deep and have an
25 inch or two of moisture; right?

1 A. Yes.

2 Q. And one that might be a slight
3 depression that maybe has a half an inch of
4 depression or maybe even less that allows for
5 the collection of moisture; correct?

6 MR. GIBBONS: Form and
7 foundation.

8 A. Yes. There are varying degrees of
9 birdbaths caused by the tires of cars and
10 vehicles, yes.

11 Q. Right. And they can be caused by
12 other things too; right?

13 A. It's possible, yes.

14 Q. For example, in this case, are you
15 aware that Mr. Schmitt was involved in actually
16 seeing that a power line was tunneled
17 underneath the asphalt in this area, near the
18 area where Ms. Ackerman fell?

19 MR. GIBBONS: Form and
20 foundation, mischaracterizes the testimony.

21 A. I did see the testimony discussion
22 about that, yes.

23 Q. And so doing work underneath an
24 asphalt lot can have an impact on whether
25 there's a depression or not, can't it?

1 MR. GIBBONS: Form and
2 foundation.

3 A. Yes, it can.

4 Q. Now, I'm going to ask a question here
5 that you can consider a hypothetical, if you
6 like. I'm going to hand you Exhibit 5, so
7 we're both on the same page. And just so our
8 record is correct, set the stage here, we're
9 looking at Exhibit 5, Stall 153 in the
10 southeast corner of the lot adjacent to where
11 the exit is from the lot. And it shows the
12 black ice that we've talked about and a bag of
13 the Road Runner ice melt; correct?

14 MR. GIBBONS: Form of the
15 question.

16 A. Yes.

17 Q. Okay. And here is what I want to ask
18 you. Regardless of what caused this black
19 ice -- and you've offered some speculation as
20 to possible causes -- regardless of what caused
21 it, you would agree with me that if Mr.
22 Schmitt, in surveying the condition of his lot,
23 had seen this, it would be reasonable for him
24 to put down Road Runner ice melt; correct?

25 MR. GIBBONS: Form and

1 foundation, calls for speculation.

2 A. Yeah. I think pretty much anyone, if
3 they had seen an icy condition and had ice melt
4 available to them, that they would probably put
5 some deicer on it in the wintertime.

6 Q. Right.

7 A. I think that's a reasonable thing to
8 do.

9 Q. Right. And we know that he did that
10 after the fact here too; correct?

11 A. Yes.

12 MR. GIBBONS: Form.

13 Q. In fact, you saw in this record an
14 actual photograph, a close-up photograph -- I
15 think it's Exhibit 6 -- after the -- presumably,
16 after the ice melt had been applied that shows
17 the change in the moisture condition; right?

18 A. Yes.

19 Q. All right. I want to talk to you
20 about some things in your report on Page 5.
21 You say that the U-Park, Inc. parking lot is
22 not characterized as a high-profile commercial
23 lot. What does that mean?

24 A. There are different buildings in the
25 snow and ice removal business that some are

1 higher profile than others. Like hospitals and
2 medical facilities would be considered
3 high-profile commercial parking lots.

4 Q. I just want to make sure I'm
5 understanding you. You're not saying that
6 U-Park doesn't have the same duty as everyone
7 else to maintain this lot in a reasonable
8 manner, just because it's not a hospital
9 parking lot, are you?

10 MR. GIBBONS: Object to the form
11 of the question, calls for a legal conclusion.

12 Go ahead.

13 A. No. In my report, my intention was to
14 state that there are different trigger depths
15 depending on when people usually start doing
16 snow removal from parking lots. One-inch
17 trigger or two-inch trigger is pretty standard
18 in the industry. And a one-inch trigger is
19 used on what would be considered more of a
20 higher profile parking lot. And the U-Park
21 lot, Mr. Schmitt had decided to remove snow at
22 one-half of an inch. And one-half of an inch
23 is just, in my opinion, above and beyond when
24 99 percent of people start performing snow and
25 ice removal services. It's an indication of,

1 you know, his diligence and his desire to do a
2 good job and be very reasonable.

3 Q. Do you have any proof, other than his
4 self-serving testimony, that he actually plows
5 the lot under a one-half inch trigger depth?

6 MR. GIBBONS: Form of the
7 question.

8 Q. I mean, have you been there to see it?
9 Have you looked at any other evidence to
10 corroborate that?

11 A. No.

12 Q. Okay. And by the way, in the business
13 of making money plowing and removing snow, the
14 lower the trigger depth is, the more
15 opportunities there are to plow snow; right?

16 A. Yes, I guess that would be true.

17 Q. And you don't know the precise
18 financial arrangement between U-Park and the
19 owner of this particular lot as it relates to
20 who benefits from the frequency to which the
21 lot is plowed, do you?

22 A. No. I did not analyze that.

23 Q. You say on Page 6 that, quote, it is
24 industry standard to have a reasonable
25 inspection program in place for melting and

1 refreezing of snow. What do you claim was the
2 reasonable inspection program that Mr.
3 Smith -- Mr. Schmitt. Excuse me. You say
4 Smith in your report -- that Mr. Schmitt
5 employed on this lot on the day in question?

6 A. Well, he says in his deposition
7 testimony that he visits the lot once a day and
8 inspects it in the winter months, and then he
9 was working there the day of the incident. And
10 so that was an inspection. There's also in the
11 industry at some point, once you get beyond a
12 snow or ice event, it's not really reasonable
13 to inspect the parking lot every single day,
14 you know, day after day, after day, after day.
15 And so I just looked, and I believe he was very
16 reasonable in his inspection processes.

17 Q. Okay. And I think we talked about
18 this earlier, but you correct me if I'm wrong.
19 You're talking about snow and ice; right?

20 A. Yes.

21 Q. What's reasonable or not reasonable;
22 right?

23 A. Yes.

24 Q. You're not here to offer any opinions
25 about defective conditions in asphalt and

1 what's reasonable and not reasonable; correct?

2 MR. GIBBONS: You mean other
3 than what you already asked him?

4 A. Defective asphalt -- I mean, I already
5 said I'm not an expert in asphalt; but I am an
6 expert in examining parking lots in regards to
7 snow and ice melting or refreezing and
8 examining lots for melt/refreeze. I am an
9 expert in that.

10 Q. Okay. And Mr. Gibbons has reminded me
11 that we've talked about this already. So thank
12 you. Now, you say on Page 8 -- you offer some
13 speculation that a car or truck probably pulled
14 into this Parking Space 153, sat idling for a
15 period of time, and then after it shut off,
16 there's moisture and condensation that leaked
17 out of the tail pipe, onto the ground, and
18 froze into the patch of black ice. That's one
19 of your theories; right?

20 A. Yes. I have seen that happen before.

21 Q. Okay. So that there's not anything --
22 Strike that. That's not an uncommon occurrence
23 that you've seen in your experience?

24 A. I know it's -- it does happen.

25 Q. And knowing that that does happen,

1 what reasonable steps should a parking lot
2 operator take to ensure that that condition
3 does not present an unreasonable risk to
4 patrons of the parking lot?

5 A. Well, I've never heard of, I mean,
6 that condition becoming a dangerous condition.
7 I just know that I've seen water drip out of
8 the backs of pipes and after examining the case
9 files, it's my opinion that the -- that there
10 was not melting and refreezing from snow piles
11 that caused the black ice. And so as far as
12 what caused a patch of black ice, you know,
13 I -- to me, it's either someone threw a water
14 bottle down or a cup out, or it dripped from a
15 tile pipe. It's something very strange that is
16 not a result of improper or unreasonable snow
17 and ice removal on the part of U-Park or Mr.
18 Schmitt.

19 Q. I know that's your opinion, and you
20 know that Ms. Ackerman's expert witness
21 disagrees with that point of view; right?
22 A. I'm -- are you saying that his opinion
23 is that it's from melting and refreezing of
24 snow piles?

25 Q. Let's just get at it this way. This

1 is preliminary to a question I'm going to ask
2 you.

3 A. Okay.

4 Q. You know from reading the report from
5 Ms. Ackerman's expert that he holds opinions
6 that you disagree with; right?

7 A. Yes.

8 Q. In fact, I think you said you disagree
9 with all of his opinions.

10 A. Yes.

11 Q. And, of course, the meat of his
12 opinion is that there was an unreasonable risk
13 of injury presented to Ms. Ackerman, that
14 U-Park did not exercise reasonable care; right?

15 A. Yes. That's his belief.

16 Q. Okay. And so here's what I want to
17 get to. You hold the opinion, you've told us a
18 couple times, that U-Park was reasonable in its
19 removal of snow and ice; correct?

20 A. Yes.

21 Q. And you suggest that this black ice
22 that we've both agreed existed must have been
23 caused by something else, other than the
24 failure to properly do standard snow and ice
25 removal; right?

1 A. Yes.

2 Q. So if we start there, and we know that
3 there's black ice presented on this parking
4 lot, whatever its cause, is it your claim that
5 Mr. Schmitt has no duty to protect people from
6 that hazard?

7 MR. GIBBONS: Form and
8 foundation.

9 A. It isn't standard in the industry six
10 days after the last snow to have 100 percent of
11 a parking lot completely free of ice. No,
12 that's not reasonable.

13 Q. I'm not asking you that. Follow me
14 here for a moment. We can agree there was
15 black ice in Slot 153; right?

16 MR. GIBBONS: Form and
17 foundation.

18 A. Yes.

19 Q. And we can agree that the ice melt
20 would address that black ice, because we know
21 that that happened afterwards; right?

22 A. Yes.

23 Q. And regardless of where this black ice
24 came from, is it your claim that Mr. Schmitt
25 had no duty to protect people who were paying

1 to park in his lot from this condition?

2 MR. GIBBONS: Form of the
3 question, calls for a legal conclusion as to
4 duty.

5 A. Yeah, it -- yes, it's my opinion that
6 he was reasonable in his snow and ice
7 remediation efforts. And that's my opinion.

8 Q. So if he walks past 153 and sees this
9 black ice, he can just keep on walking and not
10 do anything about it?

11 MR. GIBBONS: Form of the question,
12 calls for speculation, mischaracterizes his
13 testimony.

14 Q. Regardless of where it came from?

15 MR. GIBBONS: Same objections.

16 A. I think in a perfect world, that would
17 be great if every single piece of black ice or
18 ice could be remediated if people walk by and
19 threw something on it. I think that would be
20 great.

21 Q. So are you saying he could just walk
22 past it and not do anything?

23 MR. GIBBONS: Form of the
24 question.

25 A. That's a hypothetical question, and I

1 just -- I don't necessarily agree with that
2 question.

3 Q. I'm not asking you to agree with the
4 question. Here's the question. If Mr. Schmitt
5 had walked past Slot 153 and seen this black
6 ice, which we know can be remediated by ice
7 melt because it was done after the fact, is it
8 your opinion, as a purported expert in the
9 field of snow and ice removal and parking lot
10 conditions, that Mr. Schmitt can just walk past
11 this and do nothing?

12 MR. GIBBONS: Form of the
13 question, asked and answered, calls for
14 speculation.

15 A. I mean, honestly, we don't know when
16 that occurred. We don't know how -- I mean,
17 the temperatures that were outside, that
18 melting or that black ice could have occurred
19 after he walked by that area three different
20 times that day. We don't know exactly how long
21 it was there. But if he did walk by it, and in
22 a perfect world, and he had ice melt then, yes,
23 it would be good to remediate it.

24 Q. Let me see if I can get at the same
25 concept a little different way. You do agree

1 that -- And again, I'm not asking you for a
2 legal opinion. I'm asking based upon your
3 claimed experience. You do agree that property
4 owners or someone charged with keeping a
5 parking lot safe has a reasonable obligation to
6 remediate or warn of risks that are on the
7 property?

8 MR. GIBBONS: Object to the form
9 of the question, calls for a legal conclusion.

10 A. Yes, within reason.

11 Q. Okay. And so let's see if I can use
12 an example different than what's shown in
13 Exhibit 5. If there was a big pile of vomit
14 right there, would Mr. Schmitt have any
15 obligation to put up a sign that says wet floor
16 or clean it up?

17 MR. GIBBONS: Form of the
18 question, calls for a legal conclusion,
19 foundation, calls for speculation.

20 A. Yeah, that's a total hypothetical.
21 And I didn't really analyze cleaning up vomit
22 in a parking lot.

23 Q. What if there was -- I noticed coming
24 in here in Mr. Gibbons' office today that just
25 down the street, it looks like somebody's

1 windshield was busted out or there was some
2 kind of a car accident; and there's a
3 considerable amount of broken glass in the
4 street that is just outside of this law office.
5 If there was a considerable pile of broken
6 glass in this lot, say, in Spot 153 near the
7 exit of this lot, do you think that a person
8 like Mr. Schmitt would have any obligation to
9 do anything about that?

10 MR. GIBBONS: I object to the
11 form of the question, calls for speculation,
12 not a proper hypothetical.

13 A. Yeah, I've just never really thought
14 those scenarios through. I think -- I guess it
15 would be good to clean it up. Sure.

16 MR. GIBBONS: You were really
17 observant coming into this office today. And
18 for the record, it's a block down, just so
19 we --

20 MR. COOK: This is off the
21 record.

22 (An off-the-record discussion
23 was held.)

24 BY MR. COOK:

25 Q. So we're going to get to Mr. Philip

1 Wayne's opinions, but you say on Page 9, quote,
2 I disagree with all of Mr. Philip Wayne's
3 opinions in his expert report. Is that still
4 your testimony?

5 A. Yes.

6 Q. There's nothing you agree with;
7 correct?

8 A. Not that I can recall.

9 Q. Okay. And then as I understand it,
10 you take issue with Mr. Wayne's experience and
11 say he's not a real expert in this case. He
12 doesn't know anything about snow and ice. Is
13 that the gist of what you're telling us?

14 A. He is not a snow and ice removal
15 expert, no.

16 Q. But he does have a lot of experience
17 in property management; is that right?

18 A. Yes.

19 MR. GIBBONS: Foundation.

20 A. Yes, it appears that way.

21 Q. By the way, this is a common tact that
22 you employ when you serve as an expert, isn't
23 it, that when you're an adverse expert to an
24 expert on the other side of the case, it's a
25 common practice for you to say, well, they're

1 not really a Snowman like me. They don't
2 really have the snow and ice expertise that I
3 have. They're just an architect or an engineer
4 or a property manager. That's a common theme
5 in your report, isn't it?

6 MR. GIBBONS: Form and
7 foundation.

8 A. No, it's not. There are other snow
9 experts out there. I believe in bringing in a
10 qualified expert.

11 MR. COOK: Okay. I'm going to
12 ask the court reporter to read back the
13 question, because I'm not sure you heard it.

14 (Requested portion of the record
15 was read.)

16 THE WITNESS: I was asked to
17 review and analyze his expert report. And so
18 one of the things I do analyze and look at is,
19 you know, what experience does the expert have
20 in snow and ice removal? What are their
21 qualifications? And I do comment on that, and
22 I do look at their opinions and comment on
23 their opinions, yes.

24 BY MR. COOK:

25 Q. Okay. So you would agree with me,

1 then, that there would be cases where you've
2 offered opinions about the snow and ice
3 removal, and you have contrasted your expertise
4 claimed with the background and expertise and
5 the qualifications of an expert you're
6 testifying against. You've done that before,
7 whether they be an engineer or an architect or
8 property manager, and have tried to distinguish
9 their expertise from your claimed expertise;
10 right?

11 A. Yes.

12 Q. How long have you been paid 295 for
13 your testimony? Has that always been the rate
14 that you charge for your testimony?

15 A. It varies.

16 Q. I'm sorry. I didn't understand that
17 answer. Does it vary from case to case?

18 A. Sometimes.

19 Q. So there's some cases when you charge
20 more for your testimony?

21 A. Yes.

22 Q. Why is that?

23 A. It depends on how busy I am.

24 Q. And there are some times you charge
25 less for your testimony than 295?

1 A. Yes. Wait. Yes -- no. Wait. Not
2 for testimony, no.

3 Q. In any event, we can agree regardless
4 of the amount, in this case it's 295,
5 regardless of the amount that you are paid for
6 your testimony?

7 A. Yes.

8 Q. Okay. You have not met Ms. Ackerman?

9 A. No.

10 Q. You have not talked to her?

11 A. No.

12 Q. Did you read her deposition?

13 A. Yes.

14 Q. You have not met Mr. Ackerman?

15 A. No.

16 Q. You have not talked to him?

17 A. No.

18 Q. Did you read his deposition?

19 A. Yes.

20 Q. Do you have any reason to believe they
21 gave untruthful testimony?

22 A. No.

23 Q. May I come around there and show you a
24 page from your report?

25 A. Yes.

1 (An off-the-record discussion

2 was held.)

3 BY MR. COOK:

4 Q. Sir, I have Page 13 of your report,
5 and there's a photograph. I just want to make
6 sure I'm understanding it. You have some
7 bluish green arrows, one of which I've
8 highlighted; and one of these arrows is running
9 more or less from the northwest to the
10 southeast, across the lot in more or less the
11 area of Spot 153. Is that right?

12 A. Yes.

13 Q. And am I to understand that that
14 dotted arrow that you put there is to represent
15 the area of drainage from the lot?

16 A. Yes.

17 (An off-the-record discussion
18 was held.)

19 BY MR. COOK:

20 Q. Page 14 has a photograph that is the
21 same area that we were just discussing, just
22 from a different angle (Indicating)?

23 A. Yes.

24 MR. COOK: Those are all the
25 questions I have. Thank you for your

1 testimony.

2 MR. GIBBONS: I don't have any
3 questions.

4 THE DEPOSITION OF JEREMY E.

5 SWENSON, CSP, is now complete. When
6 transcribed, the original of the deposition
7 shall be given to Mr. Guy R. Cook. The
8 original exhibits shall be distributed as
9 follows: Exhibit No. 26 will be enclosed with
10 the original transcript.

11 (Deposition concluded at 2:36 p.m.)

12 (UNLESS OTHERWISE DIRECTED BY
13 COUNSEL OR THE PARTIES HERETO, THE STENOGRAPHIC
14 NOTES FOR THE FOREGOING DEPOSITION SHALL BE
15 DESTROYED AFTER A PERIOD OF 3 YEARS FROM THE
16 DATE OF TAKING OF SAID DEPOSITION.)

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1

SIGNATURE PAGE

2

I, JEREMY E. SWENSON, CSP, the

3

witness in the foregoing deposition, do hereby

4

certify that I have read the foregoing 68 pages

5

of typewritten material and that the same is,

6

with the corrections noted on the attached

7

page, if any, a true and correct transcription

8

of my deposition upon oral examination given at

9

the time and place herein stated.

10

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14

JEREMY E. SWENSON, CSP

15

16

17

Subscribed and sworn to before me this ____

18

day of _____, 2018.

19

20

21

Notary Public

22

23

24

25

1 CORRECTION/CHANGE SHEET

2 I have read the entire transcript of my
3 deposition taken on the 13th day of November,
4 2018, or the same has been read to me. I
5 request that the following changes be entered
upon the record for the reasons indicated. I
have signed my name to the signature page and
authorize you to attach the same to the
original transcript.

6 Page Line Correction or change and reason
therefor

7 _____

8 _____

9 _____

10 _____

11 _____

12 _____

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25 Date _____ Signature _____

2

3 I, the undersigned, Certified and
4 Registered Professional Reporter, duly
5 appointed commissioner for the purpose of
6 administering an oath to this witness, do
7 hereby certify that I acted as the shorthand
8 reporter in the foregoing matter at the time
9 and place indicated herein; that I took in
10 shorthand the proceedings had at said time and
11 place; that said shorthand notes were reduced
 to print under my supervision and direction by
 means of computer-aided transcription, and that
 the foregoing pages are a full and correct
 transcript of the shorthand notes so taken;
 that said deposition was submitted to the
 witness for signature, as requested to do so by
 a party or the witness; that any changes, if
 any, requested by the witness are attached
 hereto.

12

I further certify that I am neither attorney nor counsel for, or related to or employed by any of the parties in the foregoing matter, and further that I am not a relative or employee of any attorney or counsel employed by the parties hereto, or financially interested in the action.

16

IN WITNESS WHEREOF, I have hereunto set
my hand and seal this 13th day of November,
2018.

18

19

20

21

25

Stephanie J. Cawley

STEPHANIE J. COUSINS
CERTIFIED & REGISTERED
PROFESSIONAL REPORTER